IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 79-600

CARLOS SARMIENTO, ERNESTO DOMINQUEZ, ANGEL LUIS ESTEVEZ, NOLLIE S. ALEXANDER, RONNIE WAYNE NEILL, *Petitioners,*

versus

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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October 10, 1979

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TO THE UNITED STATES COURT
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The petitioners, Carlos Sarmiento, Ernesto Dominquez, Angel Luis Estevez, Nollie S. Alexander and Ronnie Wayne Neill, respectfully pray that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 10, 1979 and September 11, 1979.

OPINION BELOW

The opinion and order denying rehearing in the Court of Appeals, which have not been reported yet,

appear in the appendix to this brief. The District Court did not render any written opinions specifically directed to this case.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 10, 1979. A timely petition for rehearing and timely petition for rehearing *en banc* were denied without opinion on September 11, 1979. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether a defendant's sixth amendment right to cross-examine the key witness against him is violated when the trial court refuses to allow any cross-examination showing, as a motive for the witness' testimony, that the witness had been involved in another drug transaction known to the government and could have been prosecuted by the government for his involvement in that transaction?

Whether such a limitation on cross-examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it", as this Court held in *Davis v. Alaska,* 415 U.S. 308, 315 (1974), or whether such a limitation on cross-examination is subject to the harmless error rule of *Chapman v. California,* 386 U.S. 18 (1966).

STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE AND FACTS

Defendants, Carlos Sarmiento, Ernesto Dominquez, Angel Estevez, Nollie Alexander and Ronnie Wayne Neill were convicted by a jury of conspiracy to import marijuana into the United States in violation of 21 U.S.C. §§952(a), 960(a)(1), 963, 841(a)(1) and 846.

Wade Bailey was the government's key witness. He was intimately involved in the alleged conspiracy and described it in detail. No other witness attributed any conspiratorial conduct to the defendants. The defendants could not have been convicted if the jury refused to believe Bailey's testimony. His credibility was the major issue in the case.

On cross-examination, Bailey stated that he was cooperating with the government and testifying in both this case and another case, known as the DON ELIAS case, because of the monetary reward offered him by the government. (T. 444, 446, 451). In this case he expected to receive 25% of all property confiscated by the

government. (T. 444). In the DON ELIAS case he expected to receive $10,000 in cash and 25% of the confiscated property, not to exceed $50,000. (T. 445).

Bailey made clear, however, that his agreement with the government for compensation was not dependent on the outcome of this case, and thus did not provide any substantial motive for falsifying his testimony:

> Q: Mr. Bailey, how much money have you received from the government already for your work on this case?
>
> A: None.
>
> Q: So, in other words, it depends on what happens in this Courtroom to the Defendants whether or not you receive the full amount of the money?
>
> A: No, sir; not at all.
>
> Q: It does not?
>
> A: No, sir. I was told that the reward money was for information leading to the taking of the multi-ton load and had nothing to do with the outcome in the Courtroom.

(T. 462-63).

Other cross-examination tended to attack Bailey's general credibility. The defendants established that Baily had a prior conviction (T. 447, 463), that he did

not support his children (T. 444), and that he "possibly" might be willing to import marijuana on his own. (T. 466-67). But they could not establish any specific motive for Baily to falsify his testimony.

In fact, a specific motive existed. Bailey was a paid informant for the government in the DON ELIAS importation, which took place two and a half months before the trial in this case. He was in charge of delivering a load of marijuana. Rather than delivering all the marijuana as he was supposed to do, Bailey "skimmed" 500 pounds of marijuana for his own benefit.[1]

At the time of the trial in this case, the government had strong reason to suspect that Bailey had committed this independent crime. Although Bailey had explained the "skimming" to the government, he had denied that it was for his benefit. However, the government soon became aware of substantial rumors to the contrary. And a member of Bailey's crew told the government that the "skimming" had been for Bailey's own use. (A. 22, 25).

Significantly, Bailey fully believed that the government knew about his criminal conduct in the "skimming" operation. During a proffer outside the hearing of the jury, Bailey denied involvement in off-loading marijuana on the Cape Fear River, the site of

[1]The facts relating to Bailey's "skimming" are detailed in an order of the trial court on motions for new trial in the DON ELIAS case. The same evidence was introduced to support defendants' motion for new trial in this case. A copy of the order is included in the appendix. (A. 19-33).

the skimming. (T. 454-55). He later stated to the prosecutor that "[the prosecutor] must have been surprised by his denial of the off-loading incident. . . ." (A. 22).

Bailey's criminal involvement in the "skimming" operation, together with the government's knowledge of that involvement, provided a substantial motive for Bailey to testify favorably to the government in this case. Bailey faced the possibility of prosecution for his skimming. The threat of prosecution was the only continuing leverage that the government had on Bailey. Bailey could reasonably believe that the possibility of prosecution was dependent on whether his testimony was favorable to the government.

The reality of this threat fully materialized. Bailey had not received immunity for the skimming when he testified in this case. Facing the threat of prosecution, he testified favorably to the government. He was then granted immunity by the government for his illegal conduct in skimming the marijuana. (A. 24).

At trial, the defendants sought to develop this substantial motive behind Bailey's testimony. The government objected to cross-examination on this issue. The trial court sustained the objections. (T. 446-47, 454-55, 458-59, 462). The court did not permit the jury to hear evidence or argument that Bailey faced the possibility of prosecution for skimming the marijuana and that this possibility provided a substantial motive for his testimony.

On appeal to the United States Court of Appeals for the Fourth Circuit, defendants contended that the trial

court's limitation on Bailey's cross-examination violated their sixth amendment right to confront the witnesses against them, as construed by this Court's decision in *Davis v. Alaska,* 415 U.S. 308 (1974). The Fourth Circuit succinctly stated the issues before it:

> The appellants also assign error to the district court's refusal to allow certain impeachment of Bailey. They stress that Bailey was the prosecution's principal witness, and they attack the court's curtailment of questions which sought to obtain admissions from Bailey that while he had been working undercover for the government in another case which followed the seizure of the *Sea Crust,* he had "skimmed" some of the smuggled marijuana and was selling it. On appeal they argue that Bailey had subjected himself to the possibility of prosecution and that the inquiry into these events was proper impeachment to show bias or self-interest.

(A. 12). The Fourth circuit made passing reference to the constitutional issue involved in the limitation on cross-examination:

> The scope of permissible impeachment of a witness in a criminal trial generally is committed to the sound discretion of the trial court. Rule 403, Fed.R.Evid.; Alford v. United States, 282 U.S. 687, 694 (1931). That discretion must be exercised with due regard for the constitutional rights of the defendant. *See* Smith v. Illinois, 390 U.S. 129, 131-33 (1968). The trial court, however, retains the

basic power to prevent cumulative or harassing impeachment.

(A. 12-13). The court refused to confront the problem before it in constitutional terms and refused to reconcile its conclusion with this Court's mandate in *Davis v. Alaska, supra,* that such a limitation on cross-examination was "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." 415 U.S. at 315. Instead, the Fourth Circuit resorted to the less stringent "abuse of discretion" standard and found no such abuse. In the court's view, the cross-examination allowed, which generally established Bailey's bad character but no specific motive to falsify, was adequate:

> A review of the record indicates that the district court allowed extensive impeachment of Bailey's credibility. The court permitted questions which elicited that Bailey's primary motive for assisting the government was the expectation of a monetary reward; that he had taken $43,000 from the defendants and had not turned it over to the government; that he might have been willing to smuggle marijuana himself had he not been working for the government; that he had a prior conviction, and that he did not support his children. Moreover, the district court did not limit cross-examination of Bailey concerning his actions and motives with respect to the smuggling conspiracy for which the appellants were being tried.

> In view of the comprehensive impeachment evidence that was introduced and the thorough examination of Bailey concerning his transactions with the *Sea Crust* conspirators, exclusion of testimony about Bailey's illegal double-dealing in other smuggling was within the bounds of the court's permissible discretion.

(A. 13).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With This Court's Decision In *Davis v. Alaska,* 415 U.S. 308 (1974) And With Decisions Of The Circuit Courts Considering Identical Limitations On Cross-Examination.

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him". The primary component of the confrontation right is the ability to cross-examine.

> Confrontation means more than being allowed to confront the witness physicially. "Our cases construing the [confrontation] clause hold that the primary interest secured by it is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965).

Davis v. Alaska, 415 U.S. 308, 315 (1974). Meaningful cross-examination requires not only examination of the witness' perceptions and memory, but also his partiality and motive in testifying:

> The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony" . . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1366 (1959).

Davis v. Alaska, supra, at 315-16.

This Court, in a series of decisions spanning more than forty years, has recognized the fundamental and constitutional importance of free and open cross-examination of key government witnesses in criminal prosecutions. It has refused to give trial courts broad discretion to limit relevant cross-examination in the interest of judicial economy. The constitutional right of confrontation and the concomitant right of wide-reaching cross-examination have prevailed. *Davis v. Alaska,* 415 U.S. 308 (1974); *Smith v. Illinois,* 390 U.S. 129 (1968); *Gordon v. United States,* 344 U.S. 414 (1953); *Alford v. United States,* 282 U.S. 687 (1931).

In *Alford,* the defendant sought to establish that the witness was in federal custody and that this fact might show "that his testimony was biased because given under promise or expectation of immunity, or

under the coercive effect of his detention by officers of the United States which was conducting the present prosecution". 282 U.S. at 693. The Ninth Circuit affirmed the conviction, holding, as did the Fourth Circuit here, that the cross-examination allowed by the trial court was adequate. *Alford v. United States,* 41 F.2d 157, 160 (9th Cir. 1930). This Court granted certiorari and reversed. It concluded that the discretion normally afforded the trial court did not empower it to cut off *all inquiry* on a subject which might substantially affect the witness' credibility. 282 U.S. at 694.

The constitutional basis for the *Alford* holding was made explicit in *Smith v. Illinois,* 390 U.S. 129 (1968). In *Smith,* the trial court sustained objections to questions seeking to discover the principal government witness' true name. The state appeals court affirmed on the ground that the defendant was not prejudiced by this limitation on cross-examination. *People v. Smith,* 217 N.E.2d 546, 548 (Ill.App. 1966). This Court reversed:

> As the Court said in *Pointer,* "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." 380 U.S., at 404, 85 S.Ct. at 1068. Even more recently we have repeated that "[a] denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice

would cure it." *Brookhart v. Janis,* 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314.

390 U.S. at 131. The defendant had not been completely denied the right of cross-examination. Yet the partial denial was an error of constitutional proportion.

This Court has not only recognized the constitutional problem which is raised by prohibiting cross-examination into areas relevant to a key witness' bias or motive, but has also recognized that this constitutional dimension precludes analysis in traditional terms of trial court discretion.

In *Gordon v. United States,* 344 U.S. 414 (1953), the defendant sought to impeach the key witness with the transcript of the witness' plea proceeding in which a federal judge, who still had not sentenced the witness, told the witness that he would be "well-advised" to cooperate with the government. The jury was fully aware that the witness had pled guilty but had not yet been sentenced. The Seventh Circuit found no abuse of discretion in excluding the transcript since the jury was fully aware of the witness' predicament. *United States v. Gordon,* 196 F.2d 886, 889 (7th Cir. 1952).

This Court granted certiorari and reversed. The transcript was extremely relevant. The jury "might have regarded it as an incentive to involve others, and to supply a motive for [the witness'] testimony other than a duty to recount the facts as best he could remember them". 344 U.S. at 422. This Court rejected the government's argument that the trial court had discretion to exclude the transcript. No issue of discretion was involved. The trial court simply could not

keep from the jury information which was crucial to the credibility of the government's key witness:

> The Government, in its brief, argues strongly for the widest sort of discretion in the trial judge in these matters and urges that even if we find error or irregularity we disregard it as harmless and affirm the conviction. We are well aware of the necessity that appellate courts give the trial judge wide latitude in control of cross-examination, especially in dealing with collateral evidence as to character. [Citation omitted]. But this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony . . .

344 U.S. at 422-23.

In *Davis v. Alaska,* 415 U.S. 308 (1974), this Court applied the principles of *Alford, Smith* and *Gordon* to facts extremely similar to those involved here. The defendant in *Davis* was precluded from questioning a key prosecution witness about his adjudication as a juvenile delinquent and his status as a probationer. Noting that the sixth amendment's confrontation clause has consistently been construed to secure the right of cross-examination, this Court observed that one way to attack a witness' credibility on cross-examination is to reveal "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to the issues at hand". 415 U.S. at 316. Given that fact, the claim of bias sought to be developed was admissible "to afford a basis for an inference of undue pressure because of [the

witness'] vulnerable status as a probationer . . . as well as of [his] possible concern that he might be a suspect in the investigation," 415 U.S. at 318. Error of constitutional magnitude occurred when the defendant was precluded from introducing that evidence.

The Alaska Supreme Court, like the Fourth Circuit in this case, found that the limitation on cross-examination was not an abuse of discretion because "counsel for the defendant was able adequately to question the youth in considerable detail concerning the possibility of bias or motive." *Davis v. State,* 499 P.2d 1025, 1036 (Alaska 1972). This Court found that conclusion unacceptable:

> While counsel was permitted to ask [the witness] *whether* he was biased, counsel was unable to make a record from which to argue *why* [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On the facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it".

415 U.S. at 318 (emphasis of Court).

Here, as in *Davis,* the defendants could ask the witness whether he was biased, but they were unable to prove the facts which directly established the witness' bias. As in *Davis,* defendants' inquiry could have been effective only if they could expose the jurors to those facts which showed that the witness might be subject to undue pressure from the government. Here, as in *Davis,* there was constitutional error of the first magnitude. No showing could be made that the limitation on cross-examination was not prejudicial. Yet the Fourth Circuit concluded that the limitation here did not require reversal because, in its view, there was no prejudice. According to the Fourth Circuit, once an "adequate" cross-examination is allowed, the trial court can then exercise its discretion to preclude examination into *other subject areas* which might tend to establish a substantial motive for the witness' testimony. The holding of the Fourth Circuit simply cannot be squared with the *Davis* mandate.

The Fourth Circuit's decision in this case conflicts, not only with *Davis,* but also with circuit court decisions concerning identical limitations on cross-examination. *United States v. Croucher,* 532 F.2d 1042 (5th Cir. 1976) is illustrative. In *Croucher,* the key government witness testified on cross-examination that he had a substantial monetary incentive from the government for testifying.

The defendant sought to establish that the witness had other important motives. The trial court refused to allow the defendant to question the witness about any criminal charges which could still be pursued against the witness. The Fifth Circuit reversed. Although the defendant had established that the witness was of questionable credibility, he was still entitled, under *Davis,* to prove that the witness faced the possibilty of prosecution:

> It seems fairly clear that the jury was left without any evidence that [the witness] was very vulnerable to pressures by the prosecution at the time he gave his testimony . . . .
>
> It is thus clear that appellant's attorney was effectively prevented from inquiring into criminal events in [the witness'] past which could well have demonstrated the existence of a basis for his giving biased testimony . . . . [A]t the time, [the witness] testified at trial, there were criminal incidents in his recent past of which law enforcement officials were aware and for which he could have been indicted or reindicted, since the applicable statutes had not run.

* * *

The reasoning utilized by the Court in *Davis* is similarly applicable here. The issue of the nature of [the witness'] relationship with both state and federal law enforcement officials, in connection with his participation in this case, was highly relevant to his credibility as a

> witness for the prosecution. Given this fact, we conclude that the jury was entitled to have placed before it the defense's theory of [the witness'] bias and prejudice stemming from criminal charges which could still be pursued against him.

532 F.2d at 1045-46. Here too, the jury was left without any evidence that Bailey "was very vulnerable to pressures by the prosecution at the time he gave his testimony". Here, as in *Croucher,* the limitation on cross-examination resulted in a violation of the sixth amendment.

United States v. Garrett, 542 F.2d 23 (7th Cir. 1976) also followed the letter and spirit of *Davis.* The chief witness against the defendant was a police officer who was suspended for failing to take a urine test after he was suspected of using hard drugs. The trial court refused to allow cross-examination of the witness about his suspension. The Seventh Circuit concluded that *Davis* mandated reversal:

> The jury was entitled to know that the witness who had accused Garrett of arranging the sale of heroin had been suspended because he was suspected of using hard drugs himself and had refused to submit to a urine test . . . . [The witness] might well have looked upon a successful prosecution of Garrett as a means of having his suspension lifted and being returned to full duty as a police officer.

542 F.2d at 26. The court rejected the government's contention, accepted by the Fourth Circuit in this case,

that the limitation could be justified because of extensive cross-examination *in other areas.* 542 F.2d at 25.

Other decisions are in accord, and have summarily reversed convictions once a *Davis* violation was established. *United States v. Carreon,* 572 F.2d 683 (9th Cir. 1978) (conviction reversed where trial court refused to allow questioning of key government witness about federal charges pending in another case; dissent argued that error was harmless in light of evidence showing witness of questionable character); *United States v. Harris,* 501 F.2d 1 (9th Cir. 1974) (court refused to allow trial court discretion to limit cross-examination in this area). *See also United States v. Leja,* 568 F.2d 493 (6th Cir. 1977); *United States v. Alvarez-Lopez,* 559 F.2d 1155 (9th Cir. 1977); *Annunziato v. Manson,* 566 F.2d 410 (2d Cir. 1977); *Johnson v. Brewer,* 521 F.2d 556 (8th Cir. 1975); *United States v. Sanfilippo,* 564 F.2d 176 (5th Cir. 1977); *United States v. DeLeon,* 498 F.2d 1327 (7th Cir. 1974).

The decision sought to be reviewed, which upheld a limitation on cross-examination in an important area relating to the key government witness' credibility, is contrary to the letter and spirit of *Davis v. Alaska, Smith v. Illinois, Gordon v. United States,* and *Alford v. United States.* Full and free cross-examination is necessary to determine truth. This Court should grant certiorari to review this abrogation of a defendant's fundamental right to cross-examine the witnesses against him, guaranteed by the sixth amendment.

2. The Decisions Of The Circuit Courts Conflict As To Whether A Violation Of *Davis v. Alaska,* 415 U.S. 308 (1974) May be Harmless Under The Standard Of *Chapman v. California,* 386 U.S. 18 (1966).

The trial court here prevented any cross-examination of the key government witness showing that he faced the possibility of prosecution for his involvement in another drug transaction. The defendants sought to establish that the possibility of prosecution provided a substantial motive for the witness to testify favorably to the government.

In *Davis v. Alaska,* 415 U.S. 308 (1974), this Court concluded that such a limitation on cross-examination of the key government witness was "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it". 415 U.S. at 315. Such a limitation required reversal. Notwithstanding this holding, the Fourth Circuit concluded that the limitation on cross-examination in this case was harmless "[i]n view of the comprehensive impeachment evidence that was introduced and the thorough examination of Bailey concerning his transaction with the *Sea Crust* conspirators . . . ."

Numerous courts of appeals have considered similar cases. The decisions are in conflict as to whether *Davis* violations may be harmless in spite of this Court's apparent statement to the contrary.

Most of the courts of appeals have followed this Court's mandate and found that the limitation was an abridgment of the defendant's sixth amendment rights which, without more, required reversal. These decisions are noted in the preceding section of this petition.

Other courts have refused to apply the literal mandate of this Court that "no amount of showing of want of prejudice" would cure a *Davis* violation. Instead, they have concluded that a conviction may be affirmed, notwithstanding a *Davis* violation, if the error was "harmless beyond a reasonable doubt", the standard promulgated by this Court in *Chapman v. California,* 386 U.S. 18 (1966). But even these courts have not been consistent in their approach.

One court distinguished between a true *Davis* situation, involving a limitation on the cross-examination of a key government witness whose veracity is determinative of the outcome of the case, and those situations involving limitations on the cross-examination of merely "buttressing" prosecution witnesses. *Davis* held that the former limitation is reversible. The latter limitation, although still a violation of the defendant's sixth amendment rights, is subject to application of the harmless error rule. *United States v. Duhart,* 511 F.2d 7 (10th Cir. 1975).

Another court distinguished between a limitation on cross-examination which completely precludes inquiry into an area which might show the witness' motivation in testifying, and a limitation which only partially precludes questioning into that particular area. A complete limitation is automatically reversible under *Davis.* A partial limitation is not reversible if the error is harmless beyond a reasonable doubt. *United States v. Mayer,* 556 F.2d 245, 252, n.10 (5th Cir. 1977)("Where, on the other hand, there has not been a complete denial of access to a *proper area* of defense cross-examination, the *Chapman* standard is the proper one for gauging whether the district court's error requires reversal").

A third court refused to adopt any such distinctions. It held that "the harmless error rule announced in *Chapman* [is applicable] where the sixth amendment comes into play by reason of a limitation on cross-examination . . ." *United States v. Price,* 577 F.2d 1356, 1363 (9th Cir. 1978). *Price,* however, did not involve the cross-examination of the sole witness against the defendants. "[T]he testimony of many witnesses, who corroborated each other on most of the facts in the case, was overwhelming". 577 F.2d at 1362. The court carefully pointed out that the same limitation on the cross-examination of a "crucial" witness, without whose testimony there could not have been a conviction, might very well never be harmless. 577 F.2d at 1363.

Finally, some courts have uncritically considered whether a specific limitation was harmless under *Chapman* without considering whether *Chapman* should apply at all to such a violation of *Davis. Compare Patterson vs McCarthy,* 581 F.2d 220 (9th Cir. 1978)(limitation on cross-examination not harmless because key witness' credibility crucial to case) *with United States v. Fitzgerald,* 579 F.2d 1014, 1021 (7th Cir. 1978)(eleven day cross-examination of key witness provided "sufficient information to make a discriminating appraisal of the witness' motives and bias").

In *Chapman v. California,* 386 U.S. 18 (1966), this Court fashioned a rule of harmless constitutional error. Under certain circumstances, a conviction may be affirmed notwithstanding error of constitutional dimension:

> The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

386 U.S. at 23. A conviction may be affirmed if it appears beyond a reasonable doubt that there is no such possibility. 386 U.S. at 24.

This Court carefully pointed out, however, that certain constitutional errors are never harmless:

> [T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . .

386 U.S. at 23. It cited as examples coerced confessions, *Payne v. Arkansas,* 356 U.S. 560 (1958); right to counsel, *Gideon v. Wainwright,* 372 U.S. 335 (1963); and the right to an impartial judge, *Tumey v. Ohio,* 273 U.S. 510 (1927). Other rights are seemingly beyond the pale of the harmless error rule. *See Price v. Georgia,* 398 U.S. 323 (1970)(double jeopardy); *Peters v. Kiff,* 407 U.S. 493 (1972)(grand jury selection); *Anders v. California,* 386 U.S. 738 (1967)(right to appeal).

Good reasons exists for this Court to reaffirm its holding in *Davis.* Any trial court ruling which completely prevents cross-examination of a key government witness about information crucial to his credibility is prejudicial. The right to cross-examine about the credibility of a key government witness resembles other rights recognized as requiring automatic reversal because it is impossible to judge what effect the disallowed cross-examination might

have had on the jury. Appellate attempts to appraise the impact upon the jury of such unknown and unknowable matters are purely speculative. Any of the rights excluded from the operation of *Chapman* require automatic reversal because the denial of the right produces such subtle and unquantifiable influences that the court is unable to judge its effect.

Here, the key witness proffered his monetary motive for aiding the government, but explained that his compensation was not dependent on the case's outcome. The jury apparently accepted this explanation and determined that the witness' motive did not establish that his testimony might be false. Here, as in *Davis,* the defendants were precluded from establishing another distinct motive which might cause the witness to falsify his testimony. It is impossible for a court to determine that the jury would still have believed the witness when faced with this additional, more compelling motive.

The right to cross-examine the key witness on issues relating to his credibility should escape application of the harmless error rule for other reasons. Like the rights recognized to be outside *Chapman,* the right to cross-examine is fundamental. It is part of the due process right to a fair trial and is recognized as such even in extra-judicial proceedings. It is embraced in the right of the defendant to meet and deny the accusations against him. It is essential to the truth-seeking process. Considerations such as these make the right to cross-examine fundamental to the fairness, the dignity and the vitality of the judicial process.

This Court should grant certiorari to reaffirm its mandate in *Davis v. Alaska* that "no amount of showing of want of prejudice" could cure the constitutional error in this case.

CONCLUSIONS

For these reasons, a writ of certiorari should issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Fourth Circuit.

This case presents a clear violation of *Davis v. Alaska, Smith v. Illinois, Gordon v. United States,* and *Alford v. Davis.* Nevertheless, the Fourth Circuit refused to confront the constitutional violation before it. This Clear violation may well preclude any need to fully brief this case or docket it for oral argument. Petitioners suggest that this Court exercise its supervisory powers and remand this case to the Fourth Circuit with directions to consider Petitioners' sixth amendment claims in light of *Davis v. Alaska* and the other decisions of this Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5112

United States of America,

Appellee,

-v-

Ernesto Dominguez, Angel Louis Estevez
and Carlos Sarmiento,

Appellants.

No. 78-5114

United States of America,

Appellee,

-v-

Nollie S. Alexander,

Appellant.

No. 78-5115

United States of America,

Appellee,

-v-

Ronnie Wayne Neill,

Appellant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Wilmington. F. T. Dupree, Jr., District Judge.

Argued March 6, 1979 Decided August 10, 1979

Before BUTZNER and RUSSELL, Circuit Judges, and EDWARD DUMBAULD, Senior District Judge for the Western District of Pennsylvania, sitting by designation.

Edward Shohat (Bierman, Sonnett, Bailey & Shohat, P.A. on brief) Robert White Johnson (Crossley and Johnson on brief) Dwight F. Drake for appellants; Herman E. Gaskins, Jr., Special Assistant United States Attorney (George M. Anderson, United States Attorney on brief) for appellee.

BUTZNER, Circuit Judge:

Nollie S. Alexander, Ernesto Dominguez, Angel Estevez, Ronnie Wayne Neill, and Carlos Sarmiento appeal their convictions of conspiracy to import marijuana into the United States in violation of 21 U.S.C. §§952(a), 960(a)(1), 963, 841(a)(1), and 846. We affirm.

During the spring of 1977, Wade Bailey, the captain of a fishing trawler in Wrightsville Beach, North Carolina, was approached by two of the defendants,[1] who suggested that Bailey assist them in smuggling a large load of marijuana. Bailey reported this to an officer of the United States Customs Service and agreed to cooperate with the Service in order to obtain a reward for capture of the smugglers.

In the succeeding months, Bailey met repeatedly with several groups of the defendants to arrange a smuggling operation. He reported to the Customs Service after each meeting. The Service instituted its own surveillance on at least one occasion to confirm the accuracy of Bailey's information.

The defendants eventually agreed on a plan calling for a rendezvous at sea with a Bahamian freighter, the *Sea Crust,* owned and operated by Alexander, to pick up a large cargo of marijuana. Bailey's boat, the *Osprey,* was to head for a prearranged point about 40 miles off the coast of North Carolina. The *Osprey* was to broadcast a coded message on a specified radio frequency in order to signal the *Sea Crust.* Bailey was furnished a description of the *Sea Crust* so that he would

[1]Several of the defendants have not appealed. Their names are omitted from this opinion for the sake of clarity.

be able to recognize it. Bailey relayed all of this information to the Customs Service.

Pursuant to the plan, Bailey went to sea with two of the defendants. The *Osprey* broke down, however, and they returned to Wrightsville Beach without making contact with the *Sea Crust*. The next day the *Osprey* again failed to make contact with the *Sea Crust*. Bailey and his crew returned to port intending to try once more.

The defendants, however, became suspicious that the *Osprey* was under surveillance by government agents. They decided that it could not be used to meet the *Sea Crust*, and they began attempts to locate another small boat for the purpose. Bailey conveyed this information to the Customs Service.

Upon learning that the *Osprey* would not be used for the rendezvous, the Customs Service asked the United States Coast Guard to locate the *Sea Crust*. The Customs Service gave the Coast Guard the rendezvous coordinates, the radio frequency, the code words, and the description of the *Sea Crust*. The Coast Guard dispatched a cutter to the general location of the planned rendezvous. After repeatedly broadcasting the code on the assigned frequency, the cutter received the prearranged response. The message from the ship confirmed that its captain's name was Alexander and directed the cutter to a location near the point at which the *Osprey* had attempted to make contact.

Approximately 40 miles off the coast of North Carolina, the cutter and a Customs Service airplane sighted a stationary ship. The ship bore the name *Sea Crust* and claimed a home port of Nassau,

Commonwealth of the Bahamas. The vessel matched the descriptions which Bailey and the Drug Enforcement Administration had supplied. When hailed by the cutter, the *Sea Crust* immediately unfurled a Bahamian flag on its staff, started its engines, and began moving away from the coast of the United States. It radioed that its destination was Baltimore, Maryland and refused to stop.

The Coast Guard cutter and the Customs airplane began following the *Sea Crust*. Meanwhile the Coast Guard obtained through the State Department permission from the government of the Commonwealth of the Bahamas to board and search the *Sea Crust*.

When the commander of the cutter told the *Sea Crust* that the Bahamian government had authorized a search, and ordered it to heave to, Alexander stated that the ship was really British, not Bahamian. The commander replied that this change of nationality on the high seas rendered the *Sea Crust* a stateless vessel, and therefore it was subject to search under American law. Alexander still refused to stop until the cutter fired warning shots across the bow of the *Sea Crust*. A Coast Guard boarding party boarded the *Sea Crust*, which by this time was more than 200 miles from the shore of the United States. The boarding party found six tons of marijuana. About three hours later, the Coast Guard informed its cutter that the Bahamian government had authorized seizure of the *Sea Crust* and the arrest of all persons on board. The cutter's commander promptly complied.

The Bahamian Ministry of External Affairs sent the American Embassy a written confirmation of the permission to seize the *Sea Crust*. The letter referred to a ship "Sea Crust" with registration number 343707, whereas the ship which was actually seized had registration number 356095.

After an extensive trial at which Bailey was the principal witness for the government, all eighteen of the defendants were convicted.

I

Alexander, joined by the other appellants, argues that the district court erred in refusing to suppress the evidence seized on board the *Sea Crust*. He contends that the Coast Guard lacked jurisdiction to search and seize the ship because it was a foreign vessel on the high seas. He also argues that the search and seizure violated the convention on the High Seas.

The answers to the questions Anderson raises are found in 19 U.S.C. §§1581(h) and 1587(a) and 14 U.S.C. §89(a). Although the United States and the Commonwealth of the Bahamas are parties to the Convention on the High Seas, we need not determine the legality of the seizure by the terms of this treaty. Sections 1581(h) and 1587(a) of Title 19 authorize a United States officer to board a foreign vessel and enforce the laws of the United States in contravention of a treaty pursuant to "special arrangement" with the foreign government where the ship claims registry. Where, as here, some overt acts in furtherance of the conspiracy took place in the United States, 14 U.S.C. §89(a) authorizes the Coast Guard to apprehend and

arrest co-conspirators on the high seas and to search for and seize contraband. *See* United States v. Postal, 589 F.2d 862, 884 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252, 1259 (5th Cir. 1978); United States v. Winter, 509 F.2d 975, 980-83 (5th Cir. 1975).

The permission granted by the Commonwealth of the Bahamas to board and seize the *Sea Crust* and to arrest its crew was a "special arrangement" within the meaning of 19 U.S.C. §§1581(h) and 1587(a). Consequently, the Coast Guard was authorized to exercise the powers conferred on it by §14 U.S.C. §89(a).

Alexander suggests that the discrepancy between the registration number of the vessel boarded by the Coast Guard on the one hand, and the number of the vessel referred to the Bahamian government's confirming letter on the other, means that the arrangement did not authorize the United States to board his ship. The record contains no evidence, however, that the government of the Bahamas ever disapproved the boarding of the *Sea Crust*. The registration number was in fact an incidental detail. The number was not even available to the Coast Guard until after the vessel was boarded. In the absence of any protest from the Bahamas, which had jurisdiction over the *Sea Crust* on the high seas,[2] Alexander may not assert that the United States violated the special arrangement between the two governments.

Alexander's contention, for which he offers no authority, that the special arrangement unconstitutionally invaded the prerogatives of the President to

[2]*See* Article 6, Convention on the High Seas, 13 U.S.T. at 2315.

make treaties with the advice and consent of the Senate is also without merit.

The *Sea Crust's* change of flag to avoid boarding pursuant to the permission granted by Bahama could not frustrate the Coast Guard. On the contrary, the *Sea Crust's* deception enlarged the authority of the Coast Guard and created an additional justification for boarding. By attempting to change its nationality on the high seas, the *Sea Crust,* became a stateless ship. This conferred on the United States jurisdiction over the ship supplying an independent basis for Coast Guard action under 14 U.S.C. §89(a). Freedom of navigation on the open sea exists only for vessels which property sail under the flag of one sovereign state. I Oppenheim, International Law 595-96 (7th ed. 1948). International law forbids changes of nationality on the high seas. Convention on the High Seas of 1958, Art. 6.[3] A ship which asserts such a change enjoys the protection of neither state and derives no rights under international law. See Molvan v. Attorney General for Palestine, [1948] A.C. 351, 369-70. We conclude that the *Sea Crust's* attempted change of nationality on the high seas subjected the vessel to the jurisdiction of the United States for the purpose of enforcing the laws of the United States pursuant to 14 U.S.C. §89(a).

The remaining issue in our analysis of the Coast Guard's authority under 14 U.S.C. §89(a) is whether the

[3]Its preamble declares that the Convention on the High Seas codifies established principle of international law relating to the high seas.

statute, as applied, violated the fourth amendment.[4] The rights of Dominguez, Estevez, Neill, and Sarmiento cannot have been violated. None of them was on board the *Sea Crust* when it was searched and none alleged an ownership interest in the ship or its cargo. *See* Rakas v. Illinios, 99 S.Ct. 421, 425, (1979). Alexander, on the other hand, owned the vessel and was aboard when it was searched. He therefore had standing to move for suppression of the evidence. *Cf.* United States vs. Cadena, 588 F.2d 100, 101-02 (5th Cir. 1979).

Alexander first stresses that the search was conducted without a warrant and argues that none of the exceptions to the warrant requirement was satisfied. We think, however, that the facts amply demonstrate that no warrant was required. The aggregate of the information secured from Bailey, the information obtained independently by the Customs Service and the Drug Enforcement Administration, and the Coast Guard's own contacts with the *Sea Crust* unquestionably gave the Coast Guard probable cause to believe that the vessel was part of an ongoing conspiracy to smuggle contraband into the country. The *Sea Crust* had mobility comparable to that of an automobile. *Cf.* United States v. Cadena, 588 F.2d 100 (5th Cir. 1979). As soon as they spotted the Coast Guard cutter, the crew of the *Sea Crust* attempted to flee. The evidence available to the Coast Guard suggested a substantial likelihood of destruction of evidence or consummation of

[4]The government has suggested alternatively that the fourth amendment is inapplicable. In view of our conclusion that the Coast Guard did not violate the amendment, we need not examine the government's alternative contention, and we do not express an opinion on this issue.

the smuggling plan if boarding were unnecessarily delayed. These exigent circumstances, combined with the clear presence of probable cause, justified the warrantless search.

Alexander also contends that the difference between the actual registration number of the *Sea Crust* and the registration number referred to in the confirming letter from the government of the Bahamas establishes a violation of the explicit requirement of the fourth amendment that search warrants particularly describe the place to be searched. The confirmation was not a warrant, however, and we have held that no warrant was required.

Therefore, we conclude that the Coast Guard complied with both domestic and international law when it boarded the *Sea Crust,* seized the vessel and its cargo of contraband, and arrested its crew.

II

Ernesto Dominguez assigns error to the district court's denial of his motions for a judgment of acquittal. He concedes that he was in North Carolina in the company of two conspirators and that he was present at three meetings with conspirators at which the smuggling operation was planned. He stresses, however, that there is no evidence that he ever said or did anything at those meetings. He argues that the evidence shows nothing more than his presence and that this does not suffice to prove his guilt.

We agree with Dominguez's contention that evidence of mere presence or association is insufficient

to support a conviction for conspiracy. We held as much in reversing a conviction in United States v. Stroupe, 538 F.2d 1063, 1066 (4th Cir. 1976). We cannot, however, accept the proposition that the government must produce direct evidence of acts done or words spoken by a defendant in order to convict him of conspiracy.

The test for deciding a motion for a judgment of acquittal is whether "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt." Burks v. United States, 437 U.S. 1, 16 (1978). This standard applies to each material element of the offense. In the present case, this means that the jury must have been warranted in finding beyond a reasonable doubt that a conspiracy existed, that Dominguez knew of it, and that he voluntarily became a part of it.

There can be no doubt not only that a conspiracy existed but also that Dominguez knew of it. As to the third essential element, voluntary participation, we think the evidence more than sufficed to present a jury question. Dominguez was in North Carolina, 800 miles from his home, in circumstances from which the jury could reasonably infer that he had come to the state for the purpose of aiding the conspiracy. The only evidence of innocent motive for Dominguez's presence in North Carolina was the statement of his codefendant Sarmiento that Dominguez, Estevez, and he had come to North Carolina to hunt and fish. This exculpatory statement was false. The evidence established that Sarmiento played an active role in the conspiracy while he was in North Carolina. There was no evidence whatsoever that upon learning the character of the

conspiratorial meetings, Dominguez made any effort to extricate himself. Instead he attended two subsequent meetings and was arrested at what appears to have been the headquarters of the smuggling operation. There the government agents seized a radio frequency sweeper (a "bug detector"), a list of radio frequencies matching the frequencies on the single sideband radio on the *Sea Crust,* a VHF walkie talkie which matched a walkie talkie found on the *Sea Crust,* and a scanner device which monitored police broadcasts.

Therefore, we conclude that the district court correctly denied Dominguez's motions for a judgment of acquittal. *Cf.* United States v. Blackshire, 538 F.2d 569, 571 (4th Cir. 1971).

III

The appellants also assign error to the district court's refusal to allow certain impeachment of Bailey. They stress that Bailey was the prosecution's principal witness, and they attack the court's curtailment of questions which sought to obtain admissions from Bailey that while he had been working undercover for the government in another case which followed the seizure of the *Sea Crust,* he had "skimmed" some of the smuggled marijuana and was selling it. On appeal they argue that Bailey had subjected himself to the possibility of prosecution and that the inquiry into these events was proper impeachment to show bias or self-interest.

The scope of permissible impeachment of a witness in a criminal trial generally is committed to the sound discretion of the trial court. Rule 403, Fed. R. Evid.;

Alford v. United States, 282 U.S. 687, 694 (1931). That discretion must be exercised with due regard for the constitutional rights of the defendant. *See* Smith v. Illinois, 390 U.S. 129, 131-33 (1968). The trial court, however, retains the basic power to prevent cumulative or harassing impeachment.

A review of the record indicates that the district court allowed extensive impeachment of Bailey's credibility. The court permitted questions which elicited that Bailey's primary motive for assisting the government was the expectation of a monetary reward; that he had taken $43,000 from the defendants and had not turned it over to the government; that he might have been willing to smuggle marijuana himself had he not been working for the government; that he had a prior conviction; and that he did not support his children. Moreover, the district court did not limit cross-examination of Bailey concerning his actions and motives with respect to the smuggling conspiracy for which the appellants were being tried.

In view of the comprehensive impeachment evidence that was introduced and the thorough examination of Bailey concerning his transactions with the *Sea Crust* conspirators, exclusion of testimony about Bailey's illegal double-dealing in other smuggling was within the bounds of the court's permissible discretion.

Closely related to this assignment of error is the appellant's motion to supplement the record and to dismiss the prosecution. The motion to dismiss alleges that an Assistant United States Attorney knew that Bailey committed perjury when he denied skimming

marijuana while working as an undercover agent in the other smuggling incident. Bailey's denial was not made known to the jury because the court had excluded this line of testimony.

We grant the motion to supplement the record. The record as supplemented, however, does not sustain the charge that the prosecution knowingly acquiesced in the introduction of perjured testimony. Accordingly, the motion to dismiss is denied.

IV

The appellants also assign error to the district court's admission, over their objections, of certain testimony by John Dolan, a special agent of the United States Customs Service. The challenged testimony consisted of statements by Dolan which repeated statements made to him by Bailey during the course of Bailey's undercover work on the case. The appellants challenge the testimony as inadmissible hearsay relying on United States v. Weil, 561 F.2d 1109 (4th Cir. 1977).

Rule 801 (d) (1) of the Federal Rules of Evidence provides that a prior consistent statement of a person who has testified and who has been subject to cross-examination is "not hearsay" and is admissible if it "is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." As we noted in Part III, the impeachment of Bailey was rife with implications that his testimony was improperly motivated. More important for present purposes, the defendants also attempted to show that Bailey's testimony concerning two government exhibits was fabricated recently. Bailey's prior consistent

statements were made long before he belatedly produced the items in question. Dolan's testimony was precisely the kind of testimony which is permitted by Rule 801 (d) (1). Our decision in *Weil* is not to the contrary.

V

Neill contends that the indictment against him should have been dismissed or that all evidence bearing his name should have been suppressed, because the government only learned his name during the course of an illegal arrest. Neill was arrested at the home of another defendant, Hobson Bennett, pursuant to a warrant naming Bennett and describing Neill, but naming him "John Doe, alias 'Red' ". The government did not learn his name until it arrested him. The district court adopted the finding of a United States magistrate that the arrest was unlawful because the government lacked probable cause to support the warrant. The court refused, however, to dismiss the indictment. After the government represented that all evidence against Neill except his name, was secured independently from the unlawful arrest, the court denied the motion to suppress.

At the outset, we agree with the district court's holding that the unlawful arrest which resulted in the disclosure of Neill's name does not compel dismissal of the indictment. United States v. Calandra, 414 U.S. 338, 353-55 (1974).

We also affirm the court's ruling denying suppression of other evidence against Neill. The fourth amendment's prohibition of unreasonable searches and

seizures is intended to protect rights of privacy against arbitrary invasions by government officials. The exclusionary rule, which has evolved from this amendment, applies only when these rights have been violated. Katz v. United States, 389 U.S. 347 (1967). In order to be subject to the exclusionary rule, evidence must, at a minimum, fall within the sphere of what reasonably can be regarded as private. We cannot accept Neill's argument that his name meets this standard. A name is simply the appelation by which a person chooses to be publicly designated. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. at 351.

The illegality of an arrest does not in itself bar the introduction of evidence that has been otherwise obtained in a lawful manner. Sutton v. United States, 267 F.2d 271 (4th Cir. 1959). The primary evidence against Neill, which consisted of Bailey's testimony concerning Neill's meetings with other conspirators and a contract for a truck rented to Neill, had nothing to do with the unlawful arrest. Accordingly, we conclude that Neill's arguments relating to the unlawful arrest are without merit.

AFFIRMED.

[FILED SEP 11 1979]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5112

United States of America, *Appellee,*

versus

Ernesto Dominguez, et al, *Appellants.*

No. 78-5114

United States of America, *Appellee,*

versus

Nollie S. Alexander, *Appellant.*

No. 78-5115

United States of America, *Appellee,*

versus

Ronnie Wayne Neill, *Appellant.*

ORDER

Upon consideration of the motion for stay of the mandate pending application for certiorari and the petition for rehearing with the suggestion for rehearing en banc and no member of the court having requested a poll on the suggestion for rehearing en banc,

IT IS ORDERED that the motion for stay of the mandate is DENIED, and the petition for rehearing is DENIED.

Entered at the direction of Judge Butzner for a panel consisting of Judge Butzner, Judge Russell and Judge Dumbauld.

For the Court

/s/ William K. Slate, II
CLERK

FILED MAY 17 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WILMINGTON DIVISION

NO. 78-2-02-CR-7

ORDER

UNITED STATES OF AMERICA,
Plaintiff

VS.

MARK PHILLIPS,
Defendant

Mark Phillips was convicted in this court on April 13, 1978 of conspiracy to import marijuana in violation of the pertinent sections of Title 21, United States Code. On motion of defendant's counsel sentencing was delayed until May 8, 1978. A further motion by defendant to postpone sentencing was allowed, and the defendant was sentenced on May 12, 1978. Meanwhile, defendant had filed a motion for a new trial based on a letter written to the court following verdict by one of the jurors indicating that the verdict had been the result of a

compromise and numerous other grounds. The motion was overruled by order filed May 12, 1978.

Defendant then appealed his case to the Fourth Circuit Court of Appeals where he filed a motion to remand to this court for the purpose of lodging further motions. On November 21, 1978 the Fourth Circuit denied the motion for remand but directed this court to consider motions to dismiss and for a new trial which had been filed in this court on October 23, 1978 and to conduct such evidentiary hearings as deemed necessary in this connection.

Because of the press of other business the court was not able to schedule the evidentiary hearing until March 9, 1979, and continuous courts together with a deluge of other work with which the court has been faced has resulted in further delay in reaching decision on defendant's motions.

The two motions now before the court involve essentially the same facts and these in turn revolve around defendant's contention that one Wade Bailey, a government informant who testified at defendant's trial, had been guilty of appropriating to his own use a considerable quantity of the marijuana involved in the smuggling operation in connection with which defendant stands convicted. It is contended that the government was aware of Bailey's wrongdoing at the time of defendant's trial, knowingly withheld the information from defendant's counsel, and allowed Bailey to testify falsely concerning the matter and argued Bailey's innocence to the jury, all in violation of the rule in *Brady v. Maryland,* 373 U.S. 83 (1963), and

other cases such as *Napue v. Illinois,* 360 U.S. 264 (1959) and *Giglio v. United States,* 405 U.S. 150 (1972). On the basis of the evidence adduced at the hearing the court finds defendant's allegations are unsupported and instead the facts are found as set forth below.

This case was prosecuted on behalf of the government by Assistant United States Attorney Herman Gaskins. Gaskins had been assigned another marijuana smuggling case involving the vessel "Sea Crust" in the fall of 1977, and he went from his headquarters in Raleigh to Wilmington on Thanksgiving weekend of that year to investigate that case. He knew that there was a government informant in that case, but at that time he was not aware that the informant was Wade Bailey. Gaskins did meet Bailey in the month of December, 1977, and by that time Bailey's undercover activity had resulted in the seizure of the large shipment of marijuana which Bailey had unloaded and brought ashore from the vessel, "Don Elias", it being the shipment involved in the present case.

While Bailey was en route from the open sea where he had taken on the load of marijuana from the "Don Elias" and was proceeding up the Cape Fear River to the proposed landing site on the night of December 7-8, 1977, a small boat came alongside Bailey's fishing trawler on which the marijuana was being transported, and at Bailey's direction about five hundred pounds of marijuana was loaded on the smaller craft which then disappeared. Bailey told Gaskins about this incident but falsely stated that he did not know the identity of the operator of the small boat but had assumed that it was one of the conspirators whom he was in process of

helping to be apprehended and that this individual was engaged in an activity known in this nefarious business as "skimming," a device by which a conspirator obtains and sells for his own use a quantity of the contraband without sharing his profits with his co-conspirators.

Notwithstanding Bailey's explanation which seemed plausible enough to Gaskins, rumors began to crop up in the Wilmington area that the person in the small boat which had off loaded the marijuana before Bailey's boat reached the agreed landing site was really an accomplice of Bailey and that these two were in fact engaged in a skimming operation of their own.

At the trial in February of 1978 of the conspirators indicted in the "Sea Crust" case defense counsel sought to interrogate Bailey concerning his alleged skimming activities in the "Don Elias" case, but the government's objection was sustained on relevancy grounds. In a whispered answer to the court reporter for the record Bailey denied that he had off loaded any marijuana in the Cape Fear River.

Within a month thereafter when Mr. Gaskins was preparing for trial the cases arising out of the "Don Elias" seizure, Bailey stated in the course of his interview by Gaskins that Gaskins must have been surprised by his denial of the off loading incident but explained that he had answered the question in the negative because the incident had taken place in a tributary of the Cape Fear River instead of the river itself as the question had specified. To this Gaskins replied that he wasn't surprised because he had not been privy to Bailey's whispered answer to the court reporter and in fact was not aware that counsel were permitted to hear such answers.

The notes Gaskins took of his interview with Bailey in December of 1977 or January of 1978 show that Bailey told him that on the night in question a single man wearing a ski mask came alongside his boat in a "duck boat" and took on the marijuana; that he had not known the boat was coming; that he thought this was a common practice in "marijuana deals" and that he assumed that this person was George Purvis or Lee Smith, two of the conspirators who lived in North Carolina, who were "skimming" from the Florida conspirators, Platshorn, Meinster and Grant. Bailey denied that he knew where this five-hundred-pound lot of marijuana went to after it was taken off his boat.

George Purvis and Lee Smith entered guilty pleas to the charges brought against them in connection with the "Don Elias" case. Gaskins is not sure whether he ever asked Smith about this skimming operation prior to the trial of Mark Phillips, the defendant in this case, but he is sure that he never asked Purvis about it prior to the Phillips trial. This is because he only met Purvis three days before the Phillips trial began and his conversation at that time with Purvis and his attorneys was concerned solely with the attempt of Purvis to negotiate a plea bargain agreement which would incorporate some concessions, a proposal which Gaskins rejected. Even so, Purvis indicated that he would nevertheless cooperate with the government and testify against his co-conspirators, and he had been scheduled to testify against Phillips. Following the taking of his guilty plea, however, he left the state and did not return until the morning after the government had rested its case against Phillips, and the court declined to reopen the case on the government's motion following the representation of counsel for Phillips that he had

released the defendant's witnesses to return to Florida the night before in reliance on the fact that the government had rested its case.

By the time the Phillips trial occurred Gaskins was aware of the "allegations, gossip and rumors" about Bailey's activities in connection with the alleged skimming operation, but his efforts and those of the investigating officers to pin down the rumors prior to the trial had not been successful. It was not until more than three months after the Phillips trial that Bailey made a clean breast of the affair to the United States Attorney, George Anderson, at a conference in Raleigh on July 26, 1978 at which Gaskins and Customs Officer, John Dolan, were present. This conference was not arranged by Gaskins, and in fact he did not know it was going to occur until he was invited to participate in it a few minutes beforehand. At the conference Bailey was offered immunity for his misdeed, and he proceeded to admit that he had in fact participated with a man named Gene Carnes in this endeavor. Gaskins had nothing to do with the immunity offer, and the court is under the impression that the fact is that he would personally have strongly opposed the idea.

Although Gaskins was aware that some marijuana had been off loaded by Bailey before he reached the agreed landing site on the night in question, he did not disclose this fact to defense counsel in either the "Sea Crust" or "Don Elias" cases because he was not aware prior to the trial of these cases that Bailey had done anything illegal, and in fact since Bailey had been authorized by the Customs Service to cooperate with Purvis and other co-conspirators, Gaskins was of the

opinion that no crime had been committed. Gaskins conceded that there were rumors in the Wilmington area of wrongdoing by Bailey in this connection, and in consequence Gaskins spent a considerable time in investigating the matter. The results of his investigation prior to the Phillips trial were inconclusive, and the matter was still in the rumor stage as that case proceeded to trial.

Gaskins had been told by Charles Maultsby, a member of Bailey's crew on the night in question, that Bailey had off loaded the marijuana for his own use, and this conversation took place on January 16, 1978. However, at that time Maultsby himself was under indictment, and it was Gaskins' feeling that Maultsby, who was trying to establish a defense of entrapment (which later proved to be successful), had every reason to try to incriminate Bailey. Gaskins was therefore unwilling to accept Maultsby's statements without further investigation. Gaskins and some of the investigating agents went to Florida and tried to locate Gene Carnes, who had been identified by Maultsby as Bailey's cohort in the skimming venture, but were unable to do so. After returning to North Carolina Gaskins was able to reach Carnes by telephone, and at his request Carnes came to Gaskins' office in Raleigh on April 5 for a conference with Gaskins and Agents Dolan and Christenbury. Carnes was advised of his rights and interviewed for about an hour. The upshot of the conference was that Carnes denied ever talking to Bailey about marijuana, denied being in a duck boat on the night in question and denied knowing anything about it. Carnes gave an alibi as to his whereabouts on the dates in question which Gaskins thereafter tried without success to check out.

Gaskins then confronted Bailey with Maultsby's statements and Bailey again denied them. He did not disclose this information to defense counsel because he did not consider it was his duty "to spread the community gossip and unconfirmed rumors by indicted co-conspirators who had motives to lie." Moreover, Gaskins did not deem it necessary to communicate these rumors to Phillips' local counsel, Fred Anderson, who was quite as aware of the rumors as was Gaskins and who had continually prodded Gaskins about the matter. To Anderson's inquiries Gaskins had repeatedly replied that "you know as much about it as I do."

Attesting Gaskins' good faith in the matter is the fact that he engaged Phillips' primary counsel, Edward Shohat, in the hall while the jury was deliberating the case and for purposes of satisfying his curiosity he asked why Bailey had not been cross-examined about the skimming operation as the defense lawyers in the "Sea Crust" case had done. Shohat simply sloughed off the inquiry, and contrary to Shohat's sworn affidavit which appears in the file, he told Gaskins that his failure to cross-examine Bailey was a tactical decision which he made during the trial not to question Bailey about the subject. A similar inquiry directed by Gaskins to Attorney Fred Anderson brought the reply that he did not know why the subject had not been probed on cross-examination for that Shohat had made all the decisions during the course of the trial.

At the time the appeal of the defendants in the "Sea Crust" case was being argued in the Fourth Circuit on March 6, 1979 Attorney Shohat had become counsel for some of them, and during the course of oral argument he was asked from the bench as to why he had not cross-

examined Bailey on the skimming matter in response to which Shohat told the court that he had reviewed the transcript of the "Sea Crust" trial prior to the Phillips trial and that "on that basis alone he did not ask Wade Bailey in the Mark Phillips trial about it because he thought that he would 'be blowing smoke.' " Gaskins conceded that Shohat also told the Fourth Circuit something to the effect that at the Phillips trial it would have been unethical for him to interrogate Bailey without the benefit of hard evidence of Bailey's wrongdoing as distinguished from the rumor information which he admittedly had.

On the basis of the testimony of Customs Agent John Dolan given at the hearing the court finds that neither Dolan nor anyone in the government knew about Bailey's intention to off load some of the marijuana for his own benefit, but on the morning following the seizure Bailey told him about this and had given him the story about the man in the ski mask, thought by Bailey to be "somebody who was part of the organization," coming alongside Bailey's boat and taking on the marijuana. Bailey had been cautioned in advance that these smugglers would have small boats in the river monitoring the activities of Bailey's boat, the "Osprey". Not until after Bailey had been given immunity on July 26, 1978 did he ever disclose that this was his own deal. Apparently Bailey's accomplice, Gene Carnes, has now been given immunity, but Dolan is not aware of the details of this.

Frederick Anderson, Phillips' local counsel, testified at the hearing that prior to the Phillips trial he had no evidence "outside of rumors that were

circulating in Wilmington, North Carolina to the effect that Wade Bailey had skimmed off a sum of marijuana as he came up the Cape Fear River." Attorney Anderson said that he had tried to talk to Charles Maultsby's attorney prior to the Phillips trial but that the attorney had declined to tell him anything pending decision on Maultsby's motion to dismiss the charges against him. Anderson had learned through one of the attorneys representing some of the defendants in the "Sea Crust" case that a detective hired by those defendants to investigate the skimming operation was unable to turn up anything.

Frederick Anderson was also counsel for the defendant Richard Grant, an alleged co-conspirator of Mark Phillips, and at Grant's trial, which occurred between May 22 and 25, 1978, Anderson learned through the testimony of a government witness named Kelly, also a crewman on Bailey's boat, that he had tossed some bales of marijuana onto the small boat which had come alongside Bailey's boat on the night in question. Attorney Shohat was given this information and a transcript of the Grant trial as soon as it became available.

In addition to the foregoing facts which the courts finds from the evidence offered at the hearing on March 9, 1979 the record in the case prompts the following additional facts and observations which the court deems relevant to the inquiry.

The witness Wade Bailey was subjected to a thorough and searching cross-examination at the trial, and when he testified that his only reason for cooperating with the government was the hope of

financial reward, he established himself as one easily motivated by greed, and this served to put his credibility directly in issue. Had he been cross-examined about the skimming operation and had he chosen not to avail himself of his Fifth Amendment privilege and tell the truth, it would have added little, if anything, to the assault on his credibility. The undisputed facts would have remained that Bailey did, in fact, meet the "Don Elias" off the North Carolina Coast, take on some twenty-two tons of marijuana and transport it to the landing site on the Brunswick River near Wilmington where the raid by the officers took place.

Much of the testimony given by Bailey against Mark Phillips related to the second count of the indictment charging the substantive offense of importation of marijuana, and for reasons best known to itself and somewhat to the court's surprise the jury found Phillips not guilty on this count.

Although they were in possession of as much evidence as the government had at the time of the Phillips trial in April, 1978, counsel for Phillips waited for more than six months before asserting the grounds set forth in the motions now under consideration by the court. No acceptable explanation for this delay has been advanced. Meanwhile defendant has filed a motion for new trial assigning various other grounds immediately following the trial, and it is understood that the denial of that motion is one of the issues presently before the Fourth Circuit on appeal.

Counsel for defendant have not pointed to a single fact testified to by Bailey at the Phillips trial which can be shown to have been false.

Even without any of the testimony of Bailey, ample evidence of Phillips' guilt was provided by way of the testimony of a co-conspirator, Gaylord Lee Smith, who, according to the court's observation, gave a straightforward, thoroughly credible account of Phillips' involvement in the conspiracy, and the circumstantial evidence provided by motel registration forms, telephone records, etc.[1]

On the basis of these findings the court has no hesitance in concluding that the government did not knowingly and intentionally fail to disclose to defendant's counsel material evidence tending to show bias and affecting the credibility of the witness Bailey nor did it solicit, acquiesce in or affirmatively use materially untrue testimony of Bailey in obtaining the conviction of Mark Phillips. The court finds that there has been no violation of the rule in *Brady v. Maryland* in this case.

[1]Although it cannot be used against Phillips in this case, the testimony of the co-conspirator, George Purvis, in related cases, which as stated before, was not available to the government in this case, has served to establish Phillips' involvement about as conclusively as the government could ever hope for short of a confession by Phillips. It was the court's feeling that the government had already made out a clear case against Phillips at the time it moved to reopen the case to allow Purvis, who arrived late for the trial, to testify, and it was for this reason, that is, that the Purvis testimony would be merely cumulative, that the court denied the motion rather than for the reason advanced by defense counsel, which the court largely discounted, that he had released his witnesses (unlisted and unsubpoenaed) to return to Florida the night before on the strength of the government's having rested its case.

Nor have the principles in the *Napue*, *Giglio* and related cases been transgressed. In those cases the facts revealed that without the alleged impeaching evidence the government witness was able to present a completely "clean" appearance to the jury and "the jury was left without any evidence that the witness was vulnerable." *United States v. Croucher*, 532 F.2d 1042, 1045 (5th Cir. 1976).

There appears to this court no reasonable likelihood that the evidence of which this defendant now claims to have been deprived would have affected the judgment of the jury. *Shuler v. Wainwright*, 491 F.2d 1213 (5th Cir. 1974).

The unsubstantiated rumors concerning Bailey's wrongful actions did not constitute, in this court's view, information required to be communicated to defense counsel under the *Brady* rule, but even so the information was already well known to defense counsel, and they have no one to blame but themselves for not availing themselves of the information for cross-examination purposes at the trial. Their failure so to do and their action in waiting six months to raise the point should be held to constitute a waiver of defendant's rights, if any, related to this subject.

The suggestion by defense counsel that it would have been unethical for them to cross-examine Bailey without hard evidence of his illegal activity is rejected. Counsel in the "Sea Crust" trial which preceded the Phillips trial had perceived no problem in this regard, and except for the fact that objection to their questioning was sustained on relevancy grounds, they

obviously would have explored the matter in depth. It is difficult to see how defense counsel in the present case can complain that the government failed to disclose information to them which at best would have consisted only of an unsubstantiated rumor and at the same time take the position that had the information been available, it still could not have been used because of ethical considerations.

The court is left with the definite impression that the failure of Attorney Shohat to raise at trial the matters now urged upon the court was the result of a deliberate tactical decision reached in the hope of preserving a ground for reversal or a new trial in the event of a conviction which appeared highly probable at the time. No other plausible reason has been advanced for the decision, and the court can think of none. If the court's impression is correct, the ploy will not be allowed to succeed, at least in this court.

The defendant's motions to dismiss and for a new trial are denied.[2]

/s/ F.T. DUPREE, JR.
F.T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

May 17, 1979

[2]The grounds advanced in support of these motions other than the Bailey affair have been considered by the court and found to be without merit. As stated in the court's order of May 12, 1978, defendant's argument based on the letter received by the court from the juror, Theresa Cool, following the verdict is, of course, without merit. *Dickenson v. United States*, 421 F.2d 630 (5th Cir. 1970). This letter apparently proceeded from the failure of this juror to comprehend or at least her unwillingness to accept and apply the court's instruction that in this circuit the evidence for the government is not required to exclude every conceivable hypothesis consistent with innocence. Even so, this defendant was the apparent beneficiary of juror Cool's obtusity or obstinancy, as the case may have been, in that after about a day of deliberations the jury decided to acquit Phillips of one of the counts in the indictment thus relieving him of exposure to an additional five-year term of imprisonment and a $15,000 fine, a result which Phillips and his counsel obviously were very happy to receive.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C., 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

By: _____

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